



AIATSIS

AIATSIS Submission to IP Australia

**Indigenous Knowledge
Consultation Paper, February 2021**

Indigenous Culture and Policy
Research and Education Group

May 2021

The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) welcomes the opportunity to provide a submission in response to IP Australia's Indigenous Knowledge Consultation Paper (February 2021). This submission is made under AIATSIS's legislated function to provide advice to the Commonwealth on the situation and status of Aboriginal and Torres Strait Islander culture and heritage.¹

This submission builds on AIATSIS's previous submissions to IP Australia in 2016² and 2019³, and AIATSIS's ongoing participation in IP Australia's Indigenous Knowledge Working Group.

The AIATSIS Code of Ethics

Under the AIATSIS Act (1989), AIATSIS has statutory responsibility and authority to provide leadership in ethical practice and protocols in research and collections activities relating to Aboriginal and Torres Strait Islander peoples. In 2020, we launched the *AIATSIS Code of Ethics in Aboriginal and Torres Strait Islander Research* ("AIATSIS Code of Ethics" or "the Code").⁴ The Code is accompanied by *A Guide to Applying the AIATSIS Code of Ethics for Aboriginal and Torres Strait Islander Research*.⁵

The Code sets consistent national standards for the ethical and responsible conduct of all Aboriginal and Torres Strait Islander research. The Code was developed in consultation with the National Health and Medical Research Council (NHMRC), the Australian Research Council (ARC) and the National Indigenous Australians Agency (NIAA). Compliance with the Code is required for all research funded by or undertaken under the auspices of AIATSIS, ARC and NHMRC. Other institutions are encouraged to adopt the Code as mandatory. Unlike other guidelines, the Code encompasses all Aboriginal and Torres Strait Islander research, not only health and medical research.

The ethical principles underpinning the Code proceed from a presumption of Indigenous authority as self-determining peoples, and as rights holders, whose knowledge must be recognised, respected and valued. This is in contrast with conventional ethics frameworks, which emerge from the obligation to respect individual human dignity and

¹ Australian Institute of Aboriginal and Torres Strait Islander Studies Act (1989), s 5(e).

² Australian Institute of Aboriginal and Torres Strait Islander Studies, *How Indigenous Knowledge can work with the intellectual property (IP) system* Mar 2016 (2016), <https://aiatsis.gov.au/publication/35865>

³ Lisa Strelein & Clare Barcham, *AIATSIS Submission - Protection of Indigenous Knowledge in the Intellectual Property System* (2019), <https://aiatsis.gov.au/publication/34963>

⁴ Australian Institute of Aboriginal and Torres Strait Islander Studies, *AIATSIS Code of Ethics for Aboriginal and Torres Strait Islander Research* (2020), <https://aiatsis.gov.au/sites/default/files/2020-10/aiatsis-code-ethics.pdf>

⁵ Australian Institute of Aboriginal and Torres Strait Islander Studies, *A Guide to Applying the AIATSIS Code of Ethics for Aboriginal and Torres Strait Islander Research* (2020), <https://aiatsis.gov.au/sites/default/files/2021-03/aiatsis-guide-applying-code-ethics-guide-revised-march21.pdf>

protect the vulnerable. The Code's focus on rights, recognition and respect makes it pertinent to the work of IP Australia and the consultation at hand.

The Code offers guidance on Indigenous knowledge, practices, science, innovations and cultural expressions (1.3); engagement and collaboration (1.5-1.7); and informed consent (1.9-1.12). AIATSIS encourages IP Australia to engage with the Code in developing policies and procedures around Indigenous Knowledge. AIATSIS would be pleased to collaborate with IP Australia to engage a wider audience in the conversation around Indigenous Knowledge (IK) and Indigenous Cultural and Intellectual Property (ICIP).

1. Establishing an Indigenous Advisory Panel to IP Australia

Q1: What have you seen work in other successful Panels or similar groups that IP Australia could consider here?

AIATSIS is governed by its Council, which ensures proper and efficient performance across all of our functions. AIATSIS also has a number of committees that support and provide advice across the Institute, including the Native Title Research Advisory Committee, Research Advisory Committee and Research Ethics Committee. AIATSIS Council and Committees all have majority Indigenous membership. This majority Indigenous membership of Indigenous governance structures is in line with the Principles of Self-determination and Indigenous leadership in the AIATSIS Code of Ethics.

AIATSIS notes that none of the membership categories or qualification proposed by IP Australia explicitly cover Indigenous status. AIATSIS strongly recommends that the proposed Indigenous Advisory Panel be constituted with majority Indigenous membership. Aboriginal and Torres Strait Islander peoples have the right to make decisions in matters that affect their rights⁶This includes the right to manage the collection, interpretation and use of their information, including Indigenous Knowledge (IK).⁷

The Panel could include non-Indigenous members with particular skills, such as an understanding of contemporary IP issues, as well as Indigenous members with these and other diverse skills. This membership mix would ensure both technical expertise on IP and copyright law, as well as providing a mandated place for Indigenous perspectives,

⁶ United Nations Declaration on the Rights of Indigenous Peoples (2007), Article 31(1); AIATSIS Code of Ethics, 2.1.

⁷ Maïam Nayri Wingara Indigenous Data Sovereignty Collective and the Australian Indigenous Governance Institute, Indigenous Data Sovereignty Communique (2018), <https://static1.squarespace.com/static/5b3043afb40b9d20411f3512/t/5b6c0f9a0e2e725e9cabf4a6/1533808545167/Communique%2B-%2BIndigenous%2BData%2BSovereignty%2BSummit.pdf>; AIATSIS Code of Ethics, 2.7.

worldviews, standpoints and ways of operating.⁸ IP Australia could establish capacity development pathways for Indigenous Panel members who do not currently have expertise in IP. This would address Article 21 of the United Nations Declaration of the Rights of Indigenous Peoples and the AIATSIS Code of Ethics Responsibility of Benefit and reciprocity (3.1, AIATSIS Code of Ethics).⁹

In addition to the Panel, AIATSIS recommends that IP Australia set up partnerships and MOUs with relevant external organisations to provide specialist advice when required. This would include the forthcoming partnership with AIATSIS to provide linguistic advice on proposed trade marks incorporating words from Aboriginal and Torres Strait Islander languages. It could also include advice from Indigenous consultancies with areas of specialisation, such as art (both contemporary and traditional).

Q2: How should a Panel engage with communities or peak and representative bodies?

One of the Panel's proposed functions is to engage with cultural authorities on evidence provided by applicants. In AIATSIS's view, this would place an unfair onus on both Panel members and cultural authorities. It is the applicant's responsibility to ensure that any trade mark that incorporates IK is not proposed until a process of meaningful engagement with the relevant community or communities has been undertaken, and relationships based on trust have been built.¹⁰ The Panel could then have a role in assessing evidence of this engagement provided by applicants, similar to the role performed by a Human Research Ethics Committee (HREC). Similar to an HREC, the Panel could return decisions to the applicant asking them to secure further evidence of support and consent to use the IK. HRECs (such as AIATSIS's Research Ethics Committee) do not contact cultural authorities themselves, but rather give guidance and set expectations about how an applicant should engage with cultural authorities.

IP Australia should also consider that if the proposal is for the Panel to contact cultural authorities, this places an unfair burden on those authorities. Aboriginal communities are diverse in where cultural authority is vested. Some communities may have a formal group (such as an Elders group or Prescribed Body Corporate board) which is the seat of cultural authority. These groups and boards are often under-resourced, and requests from the IP Australia panel for advice and determinations will add to their everyday work and should be compensated. In other communities, there may be no external-facing, formalised cultural authority group; rather, a group of individuals known to the

⁸ National Health and Medical Research Council, Australian Code for the Responsible Conduct of Research (2018), Responsibility 19; AIATSIS Code of Ethics, 2.5.

⁹ Also see National Health and Medical Research Council, National Statement on Ethical Conduct in Human Research (2007, updated 2018), 4.7.7.

¹⁰ Australian Code for the Responsible Conduct of Research, Principle 6; National Statement, 4.7.10; AIATSIS Code of Ethics, 1.5.

community holds cultural authority. In this case, it would take considerable engagement by the Panel to work out who in a community is best placed to act as cultural authority. The responsibility of engagement is best placed on applicants, with the Panel as assessor of the engagement process.

Q3: What role should the Panel have when problems/conflicts arise about the use of IK?

IP Australia proposes that IP Australia examiners could assist with identifying IK issues in IP applications, make preliminary assessments, and request the Panel's consideration on applications where required. AIATSIS recommends that all applications incorporating IK enter a separate and specialised assessment process that incorporates Indigenous perspectives, standpoints and research.¹¹ This assessment process could be conducted by Indigenous assessors and non-Indigenous assessors with high levels of cultural capability.

If a specialist assessor requests the consideration of the Panel, the Panel could have a role in determining whether sufficient engagement with the relevant community has been demonstrated by the applicant to grant the trade mark. The required level of evidence is discussed in the next section. In this way, the Panel would function in a similar way to a Human Research Ethics Committee, providing final determinations about the suitability of a trade mark to be registered.

2. Measures for trade mark or design rights using IK

Q4: Would you have concerns about providing a statutory declaration, a letter of consent or other evidence, if you wanted to use IK (such as words or symbols) in a trade mark application? If so, what would your concerns be?

Where trade mark applications incorporate IK, IP Australia suggests that applicants could provide evidence such as statutory declarations, letter/s of consent, or other evidence of a consultation process or authority to use IK.

AIATSIS's strong advice is that any trade mark application incorporating IK must be accompanied by evidence of support from Aboriginal and/or Torres Strait Islander organisations who hold the IK in question. IP Australia assessors should review the evidence of support to ensure they cover:

- The IK that features in the trade mark (e.g., the language or artwork)
- The organisation or group's relationship with the IK in question

¹¹ National Statement, 4.7.11; AIATSIS Code of Ethics, 2.5.

- An outline of the engagement process between the applicant and the organisation or group
- How the organisation or group understands the plan for use of the trade mark (e.g., as the name or logo of a school)
- The organisation's support of the applicant's trade mark application
- An outline of any agreements regarding benefit sharing (including profits) from the use of the IK in the trade mark.

As part of granting ethical approval, the AIATSIS Research Ethics Committee requires applicants to supply evidence of support (for example in the form of letters of support) from Aboriginal and/or Torres Strait Islander organisations for the research. In its Dictionary and Indigenous Research Exchange grants programs, AIATSIS also requires evidence of support from community or communities before a grant will even enter the assessment process.

AIATSIS requires Indigenous applicants to provide evidence of support from relevant community organisations. This requirement also extends to Indigenous applicants working with their own communities.

IP Australia could adopt this same protocol of requiring evidence of support. AIATSIS would be glad to work with IP Australia on advice and/or training about how to assess evidence of support and the production of internal IP Australia guidelines about same.

Q5: Which of the three options, consent, offensiveness or deceptiveness do you prefer? Why?

In terms of Option 1 ("Asking for evidence of consent"), it is not clear whether the consent discussed is consent of an individual or consent of a group. As AIATSIS has stated in previous submissions to IP Australia, there is a tension between IK and IP. The rights to IK are often communal and not expressed in material form. In contrast, IP is individualistic and does not facilitate communal decision-making processes. In most cases, evidence of support for the use of IK should come from a group or organisation. The Indigenous Advisory Panel could assess whether it is appropriate for an individual to provide support for a trade mark incorporating IK. For example, this may be appropriate where the rights to the IK are vested in one particular clan, and a single individual has the cultural authority to speak on behalf of that clan.

In terms of Option 2 ("Assessing if cultural offense to a community or communities is caused"), there is no need to create a new definition of "cultural offensiveness" in order to assess whether or not a trade mark is not appropriate. IK is already covered by pre-existing research and literature on Indigenous Cultural and Intellectual Property (ICIP). IP Australia can assess whether the applicant holds the ICIP of the proposed trade mark, or if not, that they have the approval of the ICIP holders to proceed with registration. The Guide the Applying the AIATSIS Code of Ethics contains advice and links to further resources on ICIP (1.3).

In regard to the proposed definition of “cultural offensiveness”, AIATSIS notes the use of “Traditional Owner” rather than “Traditional Owners”. To reiterate, much Indigenous Knowledge is communal and/or collective property. As such, any discussion of ownership in the context of IK should proceed from the assumption that there are a collective of Traditional Owners, rather than one.

Option 3 (“Looking at if the use of IK is deceptive”) is covered by requiring an applicant to provide evidence of support from the community or communities holding the IK.

Q8: What do you think IP Australia should do in the case of an applicant providing evidence that they took all the steps they think are necessary, but did not (or could not) get written consent or find a person or authority to provide consent?

In this case, IP Australia should reject the trade mark application. Failure to obtain support to use the IK is evidence that engagement has not been sufficient, no matter what effort the applicant feels they have expended. AIATSIS warns against allowing applicants to self-assess “the steps they think are necessary”; what is necessary in terms of engagement is the decision of each Aboriginal and/or Torres Strait Islander community, not a self-assessment by an applicant. IP Australia could promote the AIATSIS Code of Ethics and its accompanying Guide to applicants, particularly the Guide’s sections on Self-reflection and cultural capability (1.2) and Indigenous engagement and project governance (1.4).

AIATSIS advises IP Australia to carefully consider the rationale of applicants attempting to trade mark IK without evidence of support. In AIATSIS’s experience, many non-Indigenous people are interested in naming buildings, classrooms and organisations with words from local Indigenous languages. In most cases, the motivation is recognition and/or Reconciliation. However, Reconciliation is actually approached not through naming itself, but in the discussions, trust-building and truth-telling that is part of the process of gaining permission to use the words in question.

Q9: If IP Australia asked you to identify if you had used IK, or to name the source where you found the IK, do you think either would be an onerous requirement? Why or why not?

Respectfully, whether or not the requirement is perceived to be “onerous” by an applicant is immaterial. IK is part of the ICIP of Aboriginal and Torres Strait Islander peoples. Per the United Nations Declaration on the Rights of Indigenous Peoples, ICIP must be respected, protected and maintained.¹² This is even more pertinent given the devastating

¹² The Declaration, Articles 11 and 31; AIATSIS Code of Ethics, 1.3 and 4.2.

effects of colonisation on Australian Indigenous peoples' cultural heritage. To use IK is a privilege, not a right.

AIATSIS supports the second option proposed, in which applicants must self-identify if they have used IK and additionally identify where they got the IK from. IP Australia could play a role here in educating applicants and fostering awareness of Aboriginal and Torres Strait Islander cultural diversity in Australia. For example, there is an enduring misconception in the wider community that there is one "Aboriginal language". In fact, there were over 250 languages in Australia at the time of colonisation from 20 unrelated language families.

Older books that are still in circulation (including by A.W. Reed and Sydney Endacott) presented "Aboriginal words" with no regard for origin. The purpose of these books was to provide inspiration for the naming of houses and estates. In the case of Endacott, many of the words presented were manipulated by the author so as to be more pleasing to English speakers; or as Endacott put it, to "run trippingly".¹³

By electing this second option, IP Australia will gain information such as this about the source of IK presented, and can educate applicants about the background of the sources to which they may refer. This will promote cultural capability and self-reflection in the wider Australian community (see 1.2, Guide to Applying the AIATSIS Code of Ethics). The forthcoming MOU between AIATSIS and IP Australia regarding ongoing linguistic advice on proposed trade marks incorporating IK will assist in this regard.

Q10: What do you think is the best way to help Indigenous businesses find out if IK they want to use is in other trade marks and designs?

Q11: Would new avenues to highlight IK in trade mark or designs help combat misappropriation, or could it cause additional issues?

In regard to Question 11, it is not appropriate to place the burden on Aboriginal and Torres Strait Islander communities and individuals of searching online portals or web apps for potential uses of IK. Rather, by making provision of evidence of support from relevant organisations a mandatory component of an IK trade mark application, any burden is appropriately placed on the applicant. Many Aboriginal and Torres Strait Islander organisations are severely under-resourced. The weekly task of searching a database for potential uses of local IK is inappropriately onerous for these community organisations.

¹³ Sydney Endacott, *Australian Aboriginal words and place names and their meanings* (Melbourne: Acacia Press, 1973).

In regard to Question 10, if Indigenous businesses wish to check whether IK they wish to use has already been trade marked, then a portal or web app is appropriate. This portal could be a register of trade marks incorporating IK which have gone through the appropriate approval process (including provision of evidence of support) and have been approved. This portal or web app could allow filtering by language group and/or community which have been identified as part of the approval process.

3. Requirements to declare when IK is used in new innovations

Q12: Which option do you think provides the best outcomes in supporting fair use of traditional knowledge? Are there other ways to encourage disclosure?

IP Australia offers two options for disclosing if IK has been used in a patent: Option 1 (Encourage disclosure) and Option 2 (Introduce penalties). The four Principles of the AIATSIS Code of Ethics are underpinned by the central value of integrity. Encouraging disclosure speaks to this foundation of integrity; of acting in the right spirit. While to some extent in Australia standards for ethical and responsible conduct of Aboriginal and Torres Strait Islander research are upheld through funding body compliance requirements, at its core ethical conduct relies on the integrity of researchers and institutions. IP Australia notes that encouraging disclosure would promote due diligence as part of doing better business.

However, the patent approval process should include more than the option of voluntary disclosure. Applicants should be mandated to provide a sworn declaration of the source of genetic resources or other knowledge being patented. Should a complaint about misuse of Traditional Knowledge later be brought, the complaint could be tested against the applicant's declaration. In the case of gross misleading of IP Australia, penalties could be applied. For example, an applicant who gathered Traditional Knowledge as part of a research project but later claimed to be unsure of the source of the knowledge should be subject to investigation. Institutional policies on research misconduct could be of assistance here in formalising a penalty process.

Q13: Should a disclosure of source be required for use of traditional knowledge that led to a new plant variety or was used in research to develop a new plant variety?

Disclosure of source should be required in this instance. Aboriginal and Torres Strait Islander peoples have the right to maintain, control, protect and develop heritage and

knowledge, including genetic and biological resources.¹⁴ Research – including plant breeding – must be conducted in a way that respects Aboriginal and Torres Strait Islander peoples’ rights to control, protect and develop their resources.¹⁵

Q14: Do you think having the ability to attach information on ABS or consent to IP rights would provide a useful basis for better conversations about ABS and consent?

The ability to attach information on access and benefit sharing (ABS) or consent to IP rights is necessary not to provide a useful basis for better conversations, but as a first step towards recognition of Indigenous peoples’ right to self-determination.¹⁶ (Principle 1, AIATSIS Code of Ethics)., All Aboriginal and Torres Strait Islander research should stand to benefit Aboriginal and Torres Strait Islander peoples.¹⁷ Indigenous peoples also have the right to ongoing control of and access to their data.¹⁸ As such, providing evidence of access and benefit sharing is not a conversation starter, but a critical element of IP applications and assessments with integrity.

Q15: What types of evidence of ABS/consent would it be possible to make available to IP Australia?

The AIATSIS Code of Ethics provides formal guidance in this regard (1.7, AIATSIS Code of Ethics; see also 1.9, Guide to Applying the AIATSIS Code of Ethics). A written agreement (such as a protocol, MOU or contract) should be entered in to between the Aboriginal and/or Torres Strait Islander community or communities and the prospective patent holder. This agreement should cover the sharing of IP resulting from the use of IK, and the agreed distribution of benefits. In the case of patents arising from use of genetic resources, a written agreement or similar would be more appropriate than a letter of support or a signed consent form.

¹⁴ The Declaration, Article 31; AIATSIS Code of Ethics, 4.2.

¹⁵ The Declaration, Articles 31 and 32; AIATSIS Code of Ethics, 4.1.

¹⁶ The Declaration, Article 3; AIATSIS Code of Ethics, Principle 1.

¹⁷ National Statement, 4.7.7; AIATSIS Code of Ethics, 3.1.

¹⁸ Maïam Nayri Wingara, Indigenous Data Sovereignty Communique; AIATSIS Code of Ethics, 4.2.